IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

MONDAY, THE 2ND JULY 2007 / 11TH ASHADHA 1929

WP(C).No. 23779 of 2006(E)

OS.698/1999 ofADDL. MUNSIFF COURT,CHERTHALA
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PETITIONER:

MRS. ELIZABATH ZACHARIA, AGED 57 YEARS,
W/O. ZACHARIA @ KUTTAPPAN, ALATHARA,
EZHUPUNNA SOUTH, KODAMTHURUTH VILLAGE.

BY ADV. SRI.BIJU M.JOHN

RESPONDENT:

K.F. MICHEAL, S/O. FRANCIS,
KARUMANCHERRIL, EZHUPUNNA SOUTH,
KODAMTHURUTH VILLAGE.

BY ADV. SRI.V.L.SHENOY

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 02/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS EXHIBITS:

EXT.P1: COPY OF THE PLAINT DATED 10/08/99 OF ADDL. MUNSIFF COURT CHERTHALA.

EXT.P2: COPY OF THE WRITTEN STATEMENT FIELD BY THE PETITIONER IN O.S.698/99 OF ADDL.MUNSIFF COURT, CHERTHALA.

EXT.P3: COPY OF THE JUDGMENT DATED 19/10/2001 IN O.S.NO.698/1999 OF MUNSIFF COURT, CHERTHALA.

EXT.P4: COPY OF THE FABRICATED AGREEMENT WHICH MARKED AS EXHIBIT A1 IN EXHIBIT P1 JUDGMENT.

EXT.P5: COPY OF THE RECEIPT DATED 10/2/03 ISSUED BY RESPONDENT.

EXT.P6: COPY OF THE ORDER DATED 21/10/2003 IN I.A.1648/2003 IN O.S.698/99 OF ADDL.MUNSIFF COURT, CHERTHALA.

EXT.P7: COPY OF CMA 13/05 FILED BEFORE THE SUB COURT, CHERTHALA.

EXT.P8: COPY OF THE AFFIDAVIT AND PETITION TO CONDONE DELAY FILED AS I.A.365/05 IN CMA.13/05 BEFORE THE SUB COURT, CHERTHALA.

EXT.P9: COPY OF THE JUDGMENT DATED 30/06/2006 OF THIS HON'BLE COURT IN W.P.(C).No.14574/06

EXT.P10: COPY OF THE ORDER DATED 08/08/2006 IN I.A.365/05 IN CMA 13/05 OF SUB COURT, CHERTHALA.

EXT.P11: COPY OF THE ORDER DATED 08/08/2006 IN CMA 13/05 OF SUB COURT, CHERTHALA

TRUE COPY

P.A.TO JUDGE

PIUS C. KURIAKOSE, J.

W.P.(C) No. 23779 OF 2006

Dated this the 2nd day of July, 2007

JUDGMENT

The facts relating to this Writ Petition filed by the defendant are that Ext.P1 suit claiming a decree for specific performance of contract for sale of the residential property of the petitioner and alternatively a decree for recovery of a sum of Rs.40,000/- being the alleged advance paid to the petitioner was filed by the respondent. The petitioner defendant was set ex-parte and the learned Munsiff proceeded to decree the first prayer in the suit on the basis of the uncontroverted evidence adduced by the respondent-defendant. Thus the suit was decreed for specific performance. Ext.P3 is the ex-parte judgment. Para 4 is the relevant paragraph. I do not find any finding entered therein as to why the court preferred to pass a decree for specific performance itself, rather than the decree for money. In other words there is nothing in Ext.P1 judgment to indicate that the learned Munsiff exercised his judicial discretion in the matter of passage of decree for specific performance as envisaged by the Specific Relief Act. An IA was filed by the petitioner to set aside the ex-parte decree. Since that IA was filed not on time, separate IA was filed for condoning the delay. Notwithstanding the delay the learned Munsiff considered the

application under Order IX Rule 13 filed by the petitioner and dismissed the same on merits under Ext.P6. Impugning Ext.P6, the petitioner filed CMA No.13 of 2005. But the above CMA was not filed on time. There was a delay of 491 days in the matter of filing the CMA. The learned Subordinate Judge was not very much inspired by the explanation offered by the petitioner for the delay which had been occasioned in the matter. The learned Judge noticed rightly that the petitioner was not at all diligent from the very commencement of the suit in pursuing her defence in the suit and dismissed the IA.

2. It is observed in the judgment of Supreme Court in **Collector, Land Acquisition, Anantnag & another v. Mst.Katiji & others (1987 SC 1353)** that heavens will not fall down by allowing an application for condoning the delay. According to the Supreme Court, the maximum that happens by condoning delay is that a cause will be adjudicated on its merits rather than being thrown out at the threshold. I have already noticed that the prayer in Ext.P1 plaint was for execution of the sale deed by the process of this court and the expenses incurred thereon be ordered to be realised from the defendant and his assets and there was an alternate prayer in Ext.P1 that the plaintiff be given a decree for return of the advance amount of Rs.40,000/-. In Ext.P3 judgment passed by the learned Munsiff as ex-parte I do not think that the learned

Munsiff has applied his mind to the question whether the present one was a fit case where the petitioner can be granted the relief for specific performance itself and not the alternate relief of the decree for money. It was noticing the above aspect of the matter that this Court while admitting the Writ Petition granted stay on condition that the petitioner deposits an amount of Rs.50,000/- either directly to the decree holder or deposits in the court below for payment to the decree holder. I am told that in compliance with the condition a sum of Rs.50,000/- has been deposited. The mind of the learned Judge is discernible from the order of 01.09.01 itself. The learned Judge perhaps thought that the learned Munsiff has passed the ex-parte decree in a mechanical manner without applying mind on the question as to whether there was justification for granting decree for specific performance itself.

3. Ext.P5 is a document which is produced in this Writ Petition by the petitioners. The case of the petitioner is that subsequent to the passage of the ex-parte decree, there was an out of court settlement between the parties under which the respondent agreed to receive a sum of Rs.50,000/- from the petitioners in full and final settlement of the claims under the decree. Ext.P5 will certainly show that a sum of Rs.50,000/- has been received by the respondent from the petitioner. Learned counsel for the respondent submits that it is highly improbable

that there will be a settlement between the parties when an ex-parte decree is already obtained by the respondent. I do not propose to settle the present controversy between the parties as to whether Ext.P5 document is a genuine one or not.

4. Having regard to the principle that all causes as far as possible should be adjudicated on their merits and the circumstance that on the terms of the ex-parte decree the petitioner who is a lady of about 60 years of age is going to be deprived of her residential abode, I am of the view that the application submitted by the petitioner ought to be allowed but only on very stringent terms. I am of the view that invocation of supervisory jurisdiction under Article 227 is necessary to mete out substantial justice between the parties. Accordingly, I set aside Exts.P9 and P10 and allow IA No.1648 of 2003 in OS No.698/99 on condition that the petitioner complies with the following conditions:

1. The petitioner shall pay to the respondent either directly or through their counsel in this court a sum of Rs.10,000/- by way of cost within one month from today.
2. The petitioner shall pay to the High Court Legal Services Committee within the aforesaid time limit a further amount of Rs.1,000/- by way of cost.

In the event of the petitioner paying both the amounts mentioned above, Exts.P6 and P10 will stand set aside and IA No.1648 of 2003 will

stand allowed. Upon the order allowing IA No1648 of 2003 becoming operative, the learned Munsiff will continue with trial of the suit from the stage at which the suit came to be decreed ex-parte against the petitioner. The learned Munsiff will special list the suit for trial in the earliest available special list and dispose of the same in accordance with law at the earliest and at any rate within two months of receiving copy of this judgment.

The Writ Petition is allowed as above.

PIUS C. KURIAKOSE, JUDGE

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